(1) Supreme Court, U.S
FILED

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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

PEGASUS GROUP, CENTRAL SELF STORAGE INVESTORS, III, CSS-HEMPSTEAD,

Petitioners,

versus

A & L ENERGY, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

PETITION FOR WRIT OF CERTIORARI

STEVEN C. POLGAR, ESQ.
Counsel of Record
LAW OFFICES OF STEVEN C. POLGAR, P.C.
7401 E. Easy St., Suite F
Post Office Box 3365
Carefree, Arizona 85377
(480) 595-6581
Fax (480) 595-6586

DEBORAH SHEA BAUKMAN, ESQ.
Co-Counsel of Record
MAYER, SMITH & ROBERTS, L.L.P.
1550 Creswell Avenue
Shreveport, Louisiana 71101
(318) 222-2135
Fax (318) 222-6420

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Does the ruling of the Louisiana Supreme Court on the facts of this case comply with the traditional notions of fair play and substantial justice as guaranteed by the due process clause of the Fourteenth Amendment to the Constitution of the United States?

2. Have the notions of fair play and substantial justice changed in light of the global economy and Internet commercial transactions and electronic communications?

3. Is the reach of a State's exercise of jurisdiction determined by the level of sophistication of the parties?

4. Are contemplated future consequences in the forum state, in the form of either a continuing relationship between the parties or continuing obligations, necessary to a finding of "purposeful availment"?

5. If, as here, neither the object of the contract nor the future consequences of the contract, *are connected* to the forum state, is the exercise of personal jurisdiction constitutional?

LIST OF PARTIES

The parties to the proceeding below were:

A & L Energy, Inc.
Central Self Storage Investors, III
CSS-Hempstead
First American Title Insurance Company
Pegasus Group

STATEMENT UNDER RULE 29.6

Petitioners Pegasus Group, Central Self Storage Investors, III, and CSS-Hempstead through their counsel state that there exists no parent corporation or publicly held company that owns Ten percent (10%) or more of corporation's stock.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

The Defendants, Pegasus Group, Central Self Storage Investors, III, and CSS-Hempstead (hereinafter referred to as "Petitioners"), respectfully pray that a writ of certiorari issue to review the Judgement and Opinion of the Supreme Court of the State of Louisiana entered in the above entitled proceeding on June 29th, 2001.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Louisiana is reported at *A & L Energy, Inc. v. Pegasus Group*, 2000-3255 (La. 6/29/01); 783 So.2d 376 and is reprinted in the Appendix hereto, Appendix 1, infra. The opinion of the Second Circuit Court of Appeal, State of Louisiana, is reported at *A & L Energy v. Pegasus Group*, 34,222 CA (La. App. 2 Cir. 11/03/00); 771 So.2d 248 and is reprinted in the Appendix hereto at, Appendix 24, infra. The opinion of the First Judicial District Court in and for the Parish of Caddo, State of Louisiana is unreported but is reprinted in the Appendix hereto, at Appendix 37, infra. The opinion of the United States Court of Appeals for the Ninth Circuit is unpublished but is reprinted in the Appendix hereto, at Appendix 39, infra. The opinion of United States District Court for the District of Oregon is unpublished but is reprinted in the Appendix hereto, at Appendix 46, infra.

JURISDICTION

On Respondent A & L Energy's appeal to the Supreme Court of the State of Louisiana, the Court entered an opinion reversing and remanding the rulings of the lower court and the appellate court and held petitioners subject to the exercise of personal jurisdiction by Louisiana courts over an interstate contract dispute between the parties. The ruling of Louisiana Supreme Court, the state court of last resort, constitutes 1) a final assertion of jurisdiction, with no further review of that issue possible in the courts of the State of Louisiana; 2) a serious threat to national policies supporting due process rights against subjection to excess state assertions of in personum jurisdiction; and 3) a state judgment on an issue ancillary to and separable from the merits, and not enmeshed in the factual controversies of the case. The jurisdiction of this court to review the judgment of the Supreme Court of the State of Louisiana is invoked under 28 USC Section 1257(a).

CONSTITUTIONS AND STATUTES INVOLVED

United States Constitution, Fourteenth Amendment
Louisiana Constitution Article II, §§ 1-2, Article V, 16
Louisiana Revised Statute 13:3201.

STATEMENT OF THE CASE

This matter arises out of a breach of contract dispute between a Louisiana Corporation (Respondent) and Two (2) California Limited Partnerships and a California Corporation (Petitioners) involving the sale of Texas real

estate. First American Title Insurance Company was listed initially as a co-Defendant but has been granted an extension of time in which to respond pending final determination of the jurisdictional question and therefore is not a party to this petition. The Louisiana Supreme Court granted the Respondent's application for a writ of certiorari to review the two (2) lower courts' determinations that the exercise of personal jurisdiction over these California Petitioners would offend traditional notions of fairness and justice constituting a denial of due process.

In March of 1999, Respondent initiated contact with Petitioners concerning the sale of two warehouse storage facilities located in Houston, Texas, which had been advertised by Petitioners in the Wall Street Journal. Pursuant to the Respondent's request, the Petitioners forwarded certain information concerning the subject properties by facsimile dated March 10, 1999. Shortly thereafter, Respondent transmitted an offer to purchase the land by facsimile on March 25, 1999, which was rejected by the Petitioners. An *Agreement of Purchase and Sale,* was transmitted to the Petitioners in California by facsimile on June 14, 1999, and by its terms was the Respondent's offer to purchase the subject Texas real estate. The Petitioners executed the contract in California and then transmitted their written acceptance by return facsimile the same date. The dispute between the parties arose in connection with Respondent's attempt to renege on the agreement.

At no time did Petitioners physically enter the State of Louisiana.

The undisputed object of the subject *Agreement of Purchase and Sale* was the transfer of title to certain real estate physically located entirely in, Harris County, Texas.

The contract was consummated in California and became binding on both parties when executed by the Petitioners in California.

No continuing relationship or obligation with Respondents was contemplated or created by the subject contract beyond the closing of the real estate transaction. Under the terms of the contract, the closing was to take place at the offices of the Escrow Agent, in Houston, Texas, or at "any other location mutually agreeable."

Under the terms of the agreement, the Petitioners were to deliver certain documents to the Respondents "at the Seller's option either at the Seller's offices or at the location of the Land," (California or Texas), before the agreed closing date and Respondent was to cause "earnest monies" to be deposited with an escrow agent in Texas, and with Petitioner in California.

Respondent's had the right to "physically inspect" the subject real estate, such inspection necessarily to take place in Houston, Texas.

No meaningful contacts, ties, or relations contemplated by the agreement were to take place in Louisiana, other than the execution of the agreement by the Respondents who initiated the contract.

The contract contained no "choice of forum" clause, but did contain a "choice of law" clause which provided:

> 20.0 *Governing Law.* This Agreement shall be governed by and construed in accordance with

> the laws of the State of Louisiana, except as to matters with respect to title to the Property which shall be governed by the laws of the State of Texas.

The only connection of any significance this transaction had to the State of Louisiana, was Respondent's receipt of the Wall Street Journal advertisement, the Respondent's receipt and transmittal of facsimile, mail and telephone communications by virtue of the Respondent's request and fortuitous residency in the State, and the unilateral activity of the Respondent in employing counsel to draft the subject *Agreement to Purchase and Sale*. The object of the Respondent's desire and of the contract was the real estate in Texas for which they were willing to pay in excess of five (5) million dollars. No continuing legal relationship was sought or created by the subject contract.

The parties agree that the issue before this court is a question of specific personal jurisdiction, as there is no dispute that general personal jurisdiction would not apply to these Petitioners who have no other connections with the State of Louisiana.

Respondent filed suit in the First Judicial District Court of Caddo Parish Louisiana. Petitioners then filed exceptions for lack of personal and subject matter jurisdiction. The court on May 11th, 2000 sustained the exceptions to lack of personal and subject matter jurisdiction (See appendix 37). Respondent then appealed to the Second Circuit Court of Appeals, State of Louisiana, and judgment was rendered November 3rd, 2000 in favor of Petitioners (See appendix 24). Respondent then filed for a Petition of Writ of Certiorari to the Supreme Court of

Louisiana. Oral arguments were had and final judgment entered on June 29th, 2001 reversing and remanding the decisions of the Second Circuit Court of Appeals and the First Judicial District Court. (See appendix 1). The issue of due process as guaranteed in the XIV Amendment to the U.S. Constitution having been raised and adjudicated in the above courts, Petitioners now file this application for Petition of Writ of Certiorari to this Court in the above matter.

REASONS FOR GRANTING THE WRIT

I.

The Supreme Court of the State of Louisiana has decided an important federal question and has rendered a decision that is in conflict with the decisions of this Court, specifically *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 471-472, 105 S.Ct. 2174, 2181, 79 L.Ed.2d 790 (1984), with federal courts of appeals and with other state courts of last resort on the same matter.

ARGUMENT

PERSONAL JURISDICTION

A. Insufficient Minimum Contacts – Constitutional Analysis under *Burger King*

The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful "contacts, ties, or relations." *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 471-472, 105 S.Ct. 2174, 2181, 79 L.Ed.2d 790 (1984). Where a forum seeks to assert

specific jurisdiction over an out-of-state defendant who has not consented to suit there, the fair warning requirement of Due Process is satisfied only if the defendant has "purposefully directed" his activities at residents of the forum and the litigation results from alleged injuries that "arise out of or relate to those activities." *Burger King*, 471 U.S., at 472, 105 S.Ct., at 2182.

This Court in *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 471-472, 105 S.Ct. 2174, 2181, 79 L.Ed.2d 790 (1984) set forth the factors to be considered in determining to what extent a contract can constitute a "contact" for purposes of due process analysis. The Court stated:

> If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot. The Court long ago rejected the notion that personal jurisdiction might turn on "mechanical" tests, *International Shoe Co. v. Washington, supra*, 326 U.S., at 319, 66 S.Ct., at 159, or "conceptualistic . . . theories of the place of contracting or of performance," *Hoopeston Canning Co. v. Cullen*, 318 U.S., at 316, 63 S.Ct., at 604. Instead, we have emphasized the need for a "highly realistic" approach that recognizes that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations ***with future consequences which themselves are the real object of the business transaction***. *Id.*, at 316-317, 63 S.Ct., at 604-605. It is these factors – prior negotiations and contemplated future consequences, along with the terms of the contract and the parties'

> actual course of dealing – that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

Burger King, 471 U.S., at 478-479, 105 S.Ct., at 2185. (Emphasis added).

In *Burger King*, a Michigan franchisee of Burger King, headquartered in Florida, had objected to the exercise of personal jurisdiction by a Florida court. The Supreme Court considered the fact that the contract at issue was for a 20 year franchise relationship, which included continued support and regulation by Burger King in Florida, and the parties' actual course of dealing repeatedly confirmed that decision making authority was vested in the Miami headquarters. The Court found that this contemplated continuous relationship of future consequence was a substantial connection with the State of Florida,

The underlying facts of this case stand in stark contrast to those before the Court in *Burger King*. Applying the four factor analysis used by the Court in *Burger King* to the facts of this case, it's clear that the exercise of personal jurisdiction over these California sellers of Texas property will offend Due Process:

(1.) Contemplated Future Consequences.

Obviously, the subject matter of the contract at issue, the sale and purchase of Texas realty, has no substantial connection to the State of Louisiana, but does have a substantial connection to the State of Texas. No continuous relationship or obligations were contemplated by the *Agreement of Purchase and Sale*, beyond the closing of

the subject real estate transaction for the sale of two warehouse storage facilities located in Houston, Texas, to occur on or before August 16, 1999, two (2) months or less after the contract was consummated. The only possible contemplated future consequence of the contract were the continued ownership, use, possession, and enjoyment of the Texas realty and continued payment of property taxes in Texas by the plaintiff, with all the attendant privileges of owning property in Texas, including the considerable benefits of Texas law and the protections of the Texas legal system.

The future consequences of a contract to buy and sell real estate overwhelmingly occur in the state where the property is located, no matter where the contract is negotiated or executed.

No continuing obligation or relationship between the parties beyond the closing was established by the contract. None of the contemplated future consequences of the contract have any connection with the State of Louisiana. Consideration of this factor weighs heavily in favor of finding that personal jurisdiction over these California vendors of the Texas realty does not exist in the Courts of Louisiana.

The holding of the Louisiana Supreme Court supports the assertion that none of the contemplated future consequences of the contract were to have any connection with the State of Louisiana. Nevertheless, the Louisiana Supreme Court rejected the Petitioners' position that, the object of the contract, i.e., the sale of Texas real estate, was material. This holding not only conflicts with this Court's holding in *Burger King*, but also conflicts with the

jurisprudence of other state courts of last resort. For example, the New York Supreme Court in *Black River Associates v. Newman*, 218 A.D.2d 273, 637 N.Y.S.2nd 880 (NY 1996), maintained personal jurisdiction over a California resident who allegedly breached a contract to purchase real estate located in the State of New York in which New Jersey vendors were seeking specific performance. The court, in finding that the contract had a substantial connection with the forum because the subject realty was located in the forum, found the connection was magnified by the "contemplated future consequences" of the agreement. The New York Supreme Court stated:

> Moreover, by acquiring a contractual interest in the real property, defendant availed himself of the various privileges of owning property in New York, including the considerable benefits of New York law and the protections of the New York judicial system. Upon execution of the contract, defendant became vested with a recordable legal interest . . . and an enforceable equitable interest in the real property. Having acquired that interest, defendant was entitled to enjoy any appreciation in its value, to insure or encumber it, and to convey it by sale, gift, bequest, or intestate succession, all pursuant to and under the protection of New York law. More persuasively, if the seller had defaulted under the contract, defendant doubtless, could have claimed the benefit of his contractual interest under New York law and sued for damages or specific performance in New York. Conversely, the defendant in that event probably could not have sued the seller in California, where defendant seeks to compel the seller to sue him.

> Similarly, based upon his acquisition of a contractual interest in New York property, defendant could have availed himself of the protection of New York law and its judicial machinery in the event of a dispute with third parties in various matters concerning, for example, priority of title, boundaries or zoning.

Black River, 218 A.D.2d, at 281, 637 N.Y.2d, at 885-886.

As the foregoing well-articulated decision of the New York Supreme Court demonstrates, the future consequences of a contract to buy and sell real estate overwhelmingly occur in the state where the property is located, no matter where the contract is negotiated or executed.

No continuing obligation or relationship between the parties beyond the closing was established by the contract. None of the contemplated future consequences of the contract have any connections with the State of Louisiana. This was an isolated real estate transaction with no substantial connection to the State of Louisiana. Consideration of this factor alone weighs in favor of declining to exercise personal jurisdiction by Louisiana's courts over these California vendors of the subject Texas realty.

(2.) The Parties' Actual Course of Dealing.

The Respondent made initial contact in March, 1999, and had contracted on June 14, 1999, to close their deal by August, 16, 1999, a period of months, not years, which hardly could be characterized as "a contract with a *substantial* connection with" the State of Louisiana.

During the entirety of the parties' dealings, the California vendors never stepped foot in Louisiana, communicating with the Respondent by telephone, facsimile, or mail.

The contract was consummated in California and became the binding agreement of the parties when executed in California by the Petitioners.

The Respondent changed its corporate mind about the deal and forwarded correspondence to the Petitioners in California seeking a termination of the contract and a return of the earnest monies.

The alleged breach of the contract, the failure to return the earnest monies, was committed if at all by Petitioners in California, not Louisiana.

Other than the Respondent's activities, the only activity of the Petitioners that could be construed as remotely occurring within Louisiana was the receipt of information regarding the property by the Respondent in accordance with their request. The Louisiana Supreme Court found that providing property information to the Respondent by fax and mail, rather than requiring them to inspect the documents at the Seller's location or the location of the property as required by the contract, weighed in favor of the exercise of personal jurisdiction.

Again, the Petitioners, by their lack of activities in Louisiana during the parties' course of dealing, never purposefully availed itself of the privileges and benefits of transacting business within this State.

(3.) Prior Negotiations.

The Petitioners offered for sale two warehouse facilities located in Houston, Texas, by advertisement in the Wall Street, Journal, a publication of wide circulation. The advertisement was not targeted specifically at a resident of Louisiana, or any other state or country, for that matter. The fact that Respondent happened to be a resident of Louisiana was of no consequence to Petitioners and is attenuated and fortuitous at best. *See, Dickson Marine, Inc. v. Panalpina, Inc.*, 961 F.Supp. 947, 951 (E.D. La. 1997) (holding that the defendant's limited national advertising in Louisiana was insufficient to satisfy minimum contacts in a breach of contract case where the entire performance of the contract was outside of Louisiana).

The Louisiana Supreme Court erroneously found that because the advertisement was in the Central Edition of the Wall Street Journal, that Petitioners' advertisement was "presumably designed to target consumers in the central United States, in relatively close proximity to the real estate for sale in Texas." It would seem very fortuitous that a Louisiana resident would respond to the advertisement given the fact that the Central Edition of the Wall Street Journal has a distribution region that includes twenty (20) states and south central Canada, including Arkansas, Kansas, Louisiana, Oklahoma, Texas, portions of New Mexico, Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, eastern Nebraska, North Dakota, northern West Virginia, Wisconsin, northern Mississippi, western New York, and western Tennessee, an easily verified fact of which this court can take judicial notice. If Petitioners had been targeting neighboring states of the property situs, as suggested by the

Louisiana Supreme Court, they could have utilized a more focused edition either the Texas Regional Edition or the Southwest Edition. Their use of the Wall Street Journal to advertise the subject Texas real estate weighs against the exercise of jurisdiction, not in favor of it.

Respondent initially contacted Petitioners in response to the advertisement and inquired about the properties, in response to which, the Petitioners forwarded certain requested information by facsimile dated March 10, 1999. Rather than reaching out unilaterally and purposefully to a Louisiana resident or the State of Louisiana, to take advantage of its laws, Petitioners simply complied with Respondent's request for information, which happened to be sent to them in Louisiana. This activity of supplying information to the Respondent was not a general sales effort by Petitioners directed at the State of Louisiana, as construed by the Louisiana Supreme Court by its holding that the same constituted "purposeful availment."

Finally, on June 14, 1999, the Respondent transmitted by facsimile a written offer to purchase the property by way of the *Agreement of Purchase and Sale* which had been drafted by counsel retained by the unilateral action of the Respondent, which was accepted by the Petitioners in writing and delivered by facsimile that same date.

The facts on this record do not support a finding that the negotiations occurred in any state in particular, taking place entirely by facsimile or telephone. It is well established that phone calls and letters are not necessarily sufficient in themselves to establish minimum contacts. *Far West Capital, Inc. v. Towne*, 46 F.3d 1071, 1077 (10th Cir.

1995) (finding the focal point of a lease relationship between a Utah lessee and Nevada lessor and Oregon sublessee was in Nevada where the subject real estate was located, and distinguishing the relative insignificance of ten-to-twenty scattered contacts alleged in negotiating the lease from daily communications involved in administering an ongoing relationship). The relevance in weighing telecommunications and correspondence is whether these contacts established a pattern of commercial dealings with the Respondent centered in Louisiana and were utilized "as a means of projecting themselves, (the Petitioners), into local commerce." *Fielder v. First City National Bank of Houston*, 807 F.2d 315, 317 (2nd Cir. 1986), (holding a Houston bank's two telephone calls and one mailing into New York in connection with a Texas real estate transaction was insufficient contact with the State of New York to confer personal jurisdiction over the bank in New York).

In the case of *Siskiyou Properties, LLC v. Bennett Holdings, LC*, the United States District Court for the District of Oregon in an unpublished decision that is almost exactly on point found that where the Seller made dozens of phone calls and shipped boxes of documents into Oregon during the negotiations and due diligence phase of the contract, there was insufficient projected activity to satisfy the purposeful availment test and confer personal jurisdiction in the Courts of Oregon. (Appendix 46). The U.S. Ninth Circuit Court of Appeals also in an unpublished decision found that the bulk of the correspondence by Bennett was issued in response to Siskiyou's expression of interest in the property and solicited by Siskiyou in the purchase and sale agreement

in the property and notes that had the transaction been consummated it would have closed in Idaho with funds disbursed in Idaho and the conveyance documents recorded in an Idaho Court house. Almost exactly the same situation is presented by the case at bar. The Court went on to find that Bennett did not purposely avail itself of the privilege of doing business in Oregon and affirmed that the District Court lacked personal jurisdiction over Bennett (Appendix 39).

At best, Louisiana's role in the parties' negotiations was fortuitous. Jurisdiction cannot be premised solely on the fact that, calls and faxes were received by Respondent in Louisiana. If these calls and faxes had gone to the Respondent at his hotel while on vacation in Mexico would this court suggest that Mexico would have jurisdiction over these parties and controversy. In light of the lack of any "purposeful availment" demonstrated by these limited contacts, the communications between California and Louisiana in this case are insufficient to establish minimum contacts.

(4.) Terms of the Contract.

Finally, the terms of the contract do not require any meaningful activities to be performed in the State of Louisiana sufficient to confer personal jurisdiction.

The Petitioners were required to produce certain documents relating to the Texas properties either in Texas, where the properties were located, or at the their offices in California.

Respondent had the right to perform a physical inspection of the property at its location in Houston, Texas.

Respondent was required to deposit the subject earnest monies in accounts located in Texas and California.

Even the closing was to occur in Houston, Texas, unless the parties agreed to some other mutually convenient location.

Then, to be considered is the "choice of law" clause. The contract clearly provided for no "choice of forum" clause, but provided that the contract, itself, was to be construed under Louisiana law, whereas matters of title were to be determined under Texas law.

The Court in *Burger King* has addressed the weight to be given a "choice of law" clause, and while acknowledging it is a factor to be considered, the Supreme Court explained its proposition in *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239-1240, 2 L.Ed.2d 1283 (1958) that "the center of gravity for choice-of-law purposes does not necessarily confer the sovereign prerogative to assert jurisdiction," and cautioned that a choice of law provision standing alone would be insufficient to confer jurisdiction. The Court then went on to hold that a choice of law clause, together with a 20 year interdependent franchise relationship, reinforced the franchisee's deliberate affiliation with the forum state and the reasonable foreseeability of possible litigation there. *Burger King*, 471 U.S., at 481-482, 105 S.Ct., at 2187. The very requirements

of the contract are indicative that the choice of law provision was incorporated because the parties believed jurisdiction over any controversy would be in a forum outside the state of Louisiana.

Lastly, the Louisiana Supreme Court seized upon the term of the contract calling for the title insurance commitment to be obtained through the New Orleans office of the escrow agent and the choice of a multi-jurisdictional escrow agent having offices in both Texas and Louisiana.

Apart from the mere fortuity of the contract's execution in Louisiana by the Louisiana vendee, the singular choice of law clause of the contract, and the possibility of a title insurance commitment through the Escrow agent's New Orleans' office, ***every meaningful, contact tie or relation of the contract was Texas and California-connected, not Louisiana connected***, again weighing against the exercise of personal jurisdiction by Louisiana courts.

In summary, applying the *Burger King* Due Process analysis to the case at bar, there is only a two (2) month contractual period before a closing on a single real estate transaction, prior negotiations by mail, telephone, and facsimile were completed as expeditiously as was commercially feasible. A choice of law clause was incorporated, with the undisputed real object of the contract being the sale and purchase of immovable property located in another state, Texas. The earnest money was deposited in Texas and California. Additionally, there are no continuing obligations or relationships established by the contract, with all contemplated future consequences of the contract occurring in Texas, not Louisiana. Substantially all of the performance of the contract was to occur

or did occur in either Texas or California. The lower courts were correct in their well reasoned analysis and decision that Petitioners did not purposefully avail themselves of conducting activities in Louisiana, and in finding, that it was merely fortuitous that the Respondent was located in Louisiana.

B. Second Prong – Fair Play and Substantial Justice

The Louisiana Supreme Court identifies two factors that in its opinion tilts the scales of justice in favor of the exercise of jurisdiction, (1.) similar inconveniences to the defendants whether they must litigate in Louisiana or Texas; and (2.) Louisiana's interest in applying its law to the contract to afford its citizen, the respondent, with the protections of Louisiana law.

However, in evaluating fairness, a court must consider the nature of the dispute, an alleged breach of a buy/sale agreement involving real estate in Texas. The nature of the contract bears greatly on the weight to be given to the interest of forum state, Louisiana, in relation to the potential interest of other states, here, Texas and California, in taking cognizance of the claim. *Burger King*, 471 U.S., at 476-477, 105 S.Ct., at 2184. The real issue on the merits is whether notice must have been received by the Petitioners during the inspection period to be effective. The Petitioners dispute Respondent's allegations that they owe the return of the earnest monies and have the right to reconvene/cross-claim for specific performance of the contract and for damages, an action necessarily affecting title to the Texas properties. Louisiana has no interest in adjudicating this type of contract action

involving real property outside of its borders, whereas Texas has a much greater interest, and in terms of enforcement of specific performance, Texas would provide a forum of greater judicial efficiency. There is no doubt that by the Respondent entering into a contract to purchase real estate in the state of Texas owned by the Petitioners, that both parties to the contract have sufficient minimum contacts with Texas for the constitutional exercise of specific personal jurisdiction over them.

The Louisiana Supreme Court's decision is again in conflict with the New York Supreme Court's decision in *Black River Associates v. Newman, supra,* which made the following observations concerning the situs state's interest in providing redress to a party to a contract to sell and purchase real estate within its borders:

> The availability of that legal framework relating to real property ownership, and of the administrative and judicial machinery of enforcement of such laws, demonstrates New York's overwhelming substantive interest in asserting personal jurisdiction over non-domiciliary buyers, to the exclusion of other states. The stability of real estate ownership is of vital concern to the situs state, and consequently each state has a "manifest interest" in providing a convenient forum for its citizens in actions to enforce contracts for the purchase of real property situated within that state. (*cf., Burger King Corp. v. Rudzewicz, supra,* at 473-474, 105 S.Ct. at 2183). In this case, the substantive interests of New York in the real estate transaction are exceedingly heavy, and the interest of other states, such as California, are slight or nonexistent. (*cf.,*

Asahi Metal Indus. Co. v. Superior Ct., supra at 114, 107 S.Ct. 1033).

Black River Associates, 281 A.D.2d, at 281, 637 N.Y.S.2d, at 886.

Here too, the interest of the State of Louisiana over this real estate contract dispute are slight, if not, in fact, nonexistent, and weigh heavily against the exercise of personal jurisdiction over these Petitioners, signifying that it would be fundamentally unfair to subject these Petitioners to jurisdiction in Louisiana.

II.

To let stand the ruling of the Supreme Court of the State of Louisiana will expand the concept of jurisdiction and will result in the demise of all restrictions on the personal jurisdictions of State Courts.

In *Hanson v. Denckla* this Court determined that the restrictions of personal jurisdiction are more than a guarantee of immunity from inconvenient or distant litigation. "They are the consequences of territorial limitation of the power of the respective states". As Justice Kimble so appropriately surmised in concluding her dissent, if this decision is allowed to stand this Court will essentially hold that a foreign Defendant who negotiates and contracts with a resident will always be subject to personal jurisdiction in the forum of the resident even when that resident reaches out from his forum to do business with the foreign Defendant. This result is contrary to the traditional notions of fair play and substantial justice underlying the principal of long arm jurisdiction as enumerated

in an *International Shoe Company v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154 (1945).

Perhaps the most chilling language in the Louisiana Supreme Court opinion is the following finding:

> Moreover, unlike the individuals involved in *Calahan*, the parties to this dispute are sophisticated commercial corporations dealing in multi-million dollar commercial real estate. The defendants were fully aware that they were dealing with Louisiana residents and voluntarily subjected themselves to Louisiana law.

Are corporations entitled to any less due process protection under the Constitution? Is the mere fact that a corporation is transacting business with a citizen of another state sufficient notice under the Constitution that the corporation should reasonably anticipate being haled into court in that state? If so, the cost of doing interstate business has just gone up dramatically. Only the wealthy with the wherewithal to have counsel in as many states could undertake to transact business on a regional or national scale if notice of the citizenship of a contracting party were constitutionally sufficient.

III.

The jurisdiction issue raised in this case must be resolved to provide a uniform standard by which businessmen in the future can rely in the conduct of their dealings especially in light of transactions by use of the world wide web.

Justice Kimball in oral argument posed some probing questions as to the implications of the Louisiana Supreme Court's ruling on those who transact business over the

Internet. The Internet truly has worldwide circulation and reach. Suppose Petitioners had chosen to advertise the Texas property on a web site. Would e-mail responses to a potential customer residing in Louisiana requesting more information regarding the Texas property be enough to subject the seller to jurisdiction? Suppose then a contract to buy/sell the property was exchanged over the Internet and then electronically signed? Are the use of a choice of law clause and an escrow agent licensed in Louisiana and Texas so significant as to tilt the scales of due process in favor of the exercise of jurisdiction? How much more attenuated does the transaction need to be in order to provide an individual with due process protection against being subjected to a binding judgment in a forum with which he has established no meaningful "contacts, ties, or relations"?

CONCLUSION

This matter arises out of a single isolated real estate transaction for Texas properties to a Louisiana resident, which reached out from the forum state to do business with the foreign sellers. In essence, the only Louisiana-connected facts are that the Louisiana resident's execution of the contract in Louisiana, a choice of law clause and a choice of an escrow agent licensed in multiple jurisdictions of which Louisiana was one.

The exercise of this Court's supervisory jurisdiction is warranted over the gross limitation of due process rights implicated by the ruling of the Louisiana Supreme Court. The Louisiana Supreme Court's decision conflicts

with this Court's *Burger King* decision in that the state court held that the exercise of personal jurisdiction over an interstate real estate contract dispute was unconstitutional in the absence of any contemplated future consequences of the contract in the forum state and sufficient minimum contacts. The Louisiana Supreme Court erroneously found documents produced to a Louisiana resident at their request constituted "availment." Additionally, the Louisiana Supreme Court erroneously presumed that an advertisement in the Central Edition of the Wall Street Journal constituted a targeting of Louisiana residents.

This was not a Louisiana business transaction. The exercise of personal jurisdiction, by Louisiana's courts over the petitioners, is a denial of due process as guaranteed by the Fourteenth Amendment to the Constitution. Furthermore, the Louisiana Supreme Court's finding of specific jurisdiction on the facts of this case will have a chilling affect on interstate and international business, not to mention E-commerce over the Internet, and will be detrimental to the best interests of the residents as well as businesses of the state of Louisiana and be against public policy. This Court should grant a writ of certiorari and reverse the decision of the Louisiana Supreme Court to

affirm the judgment of the lower courts and sustain the petitioners' exception to personal jurisdiction over these California residents.

Respectfully submitted,

LAW OFFICES OF STEVEN C. POLGAR, P.C.
STEVEN C. POLGAR
Counsel of Record
Attorney for Pegasus Group, Central Self Storage Investors, III, CSS-Hempstead
7401 E. Easy Street, Suite F
Post Office Box 3365
Carefree, Arizona 85377
(480) 595-6581
(480) 595-6586 (Fax)

MAYER, SMITH & ROBERTS, L.L.P.
DEBORAH SHEA BAUKMAN
Co-Counsel of Record for Pegasus Group, Central Self Storage Investors, III, CCS-Hempstead
1550 Creswell
Shreveport, Louisiana 71101
(318) 222-2135

SUPREME COURT OF LOUISIANA

00-C-3255

A&L ENERGY, INC.

VS

PEGASUS GROUP, CENTRAL SELF-STORAGE INVESTOR, III, CSS-HEMPSTEAD and FIRST AMERICAN TITLE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, PARISH OF CADDO

(Filed June 29, 2001)

TRAYLOR, J.*

We granted a writ of certiorari to determine whether this state may exercise personal jurisdiction over a non-resident corporate defendant who entered into a purchase agreement with a Louisiana corporation regarding commercial property located in Texas. For the reasons below, we reverse the judgment of the court of appeal, and remand to the trial court for further proceedings.

FACTS AND PROCEDURAL HISTORY

In the spring of 1999, the president of A & L Energy, Inc. ("A & L"), came across an advertisement in the Central Edition of the Wall Street Journal listing certain

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* Retired Judge Robert L. Lobrano, assigned as Justice *Pro Tempore*, sitting for Associate Justice Harry T. Lemmon;

Judge Felicia Toney Williams, of the Second Circuit Court of Appeal, assigned as Justice *Pro Tempore*, sitting for Associate Justice Bernette J. Johnson.

commercial real estate for sale in Houston, Texas.[1] A&L responded to the advertisement by calling the listed telephone number. After this initial contact, A&L and Pegasus Group ("Pegasus"), a California company that owned the property, continued to communicate by telephone and facsimile. During these communications, Pegasus provided written financial information on the property, including past and projected future rental income, property taxes paid, and summary reports of assets and liabilities.

At some point during these communications, A&L hired an attorney to draft a proposed purchase agreement and sent the agreement to Pegasus. The parties subsequently negotiated the conditions of sale and purchase price via facsimile. On June 14, 1999, A & L entered into an "Agreement of Purchase and Sale" of the real estate with Pegasus. Among other things, the agreement contained a choice of law provision specifying Louisiana law, except for matters regarding title, which would be governed by Texas law. Pursuant to the agreement, A & L paid deposits, or earnest money, of $30,000 to First American Title Insurance Company ("First American") as escrow agent, and $10,000 to Pegasus. Apparently, these funds were deposited in banks in Texas and California.

Moreover, the agreement provided a 45 day inspection period, in which A & L could terminate the agreement for any reason and its earnest money would be returned. During the inspection period, A & L notified

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[1] The subject properties were two self-storage facilities. Kimball, J. dissents and assigns reasons.

Pegasus in two separate letters of its decision to terminate the agreement. However, Pegasus refused A & L's request to return the earnest money held by it or First American based on A&L's alleged failure to comply with the notice provisions in the agreement.

On September 24, 1999, A & L filed suit in Caddo Parish, Louisiana, against four nonresident parties: Pegasus, a California legal entity;[2] Central Self Storage Investors, III, a California limited partnership (CSS); CSS Hempstead, also a California limited partnership (CSS Hempstead); and First American, a title insurer authorized to do business in Louisiana and Texas. In the suit, A & L sought the return of its earnest money, interest, and attorney fees pursuant to the terms of the contract.

On November 3, 1999, Pegasus, CSS, and CSS Hempstead jointly filed exceptions to personal and subject matter jurisdiction. In opposition to the exceptions, A & L filed an affidavit by Rex Bryan, a principal in Lea Hall Properties, the broker agent for A & L, setting forth the actions in Louisiana that pertained to the agreement.

In May 2000, the district court sustained the exceptions based on written briefs submitted by the parties. The court below found that although the parties to the contract agreed that Louisiana law would apply to resolve disputes, the agreement did not provide the court

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[2] According to A & L's petition, Pegasus was initially an undisclosed agent for CSS and CSS-Hempstead.

with subject matter or personal jurisdiction under the facts presented.[3]

The plaintiff sought review with the second circuit. *A&L Energy v. Pegasus Group, et al.*, 34,222 (La. App. 2 Cir. 11/3/00), 771 So. 2d 248. The court of appeal affirmed, and found that the contract executed between the parties was "an isolated transaction involving the sale of real estate property in another state" which failed to establish personal jurisdiction through sufficient minimum contacts with Louisiana as the forum state. The second circuit further found that requiring California defendants to defend themselves in Louisiana in a lawsuit concerning Texas real estate would offend traditional notions of fairness and justice. After concluding that Louisiana courts lacked personal jurisdiction over the defendants, the court of appeal pretermitted the issue of subject matter jurisdiction. Subsequently, this court granted a writ of certiorari to review the correctness of that decision. *A&L Energy v. Pegasus Group, et al.*, 00-3255 (La. 2/2/01), ___ So. 2d ___ .

DISCUSSION

The Louisiana long-arm statute, La. R.S. 13:3201, provides for the exercise of personal jurisdiction over a nonresident defendant by stating that:

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[3] The judgment also provided that the parties could agree to transfer the action to a court of appropriate jurisdiction within 15 days of the judgment becoming final. Otherwise, the case would be dismissed without prejudice at the plaintiff's cost.

> A. A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from any one of the following activities performed by the nonresident:
>
> (1) Transacting any business in this state.
>
> . . . .
>
> B. In addition to the provisions of Subsection A, a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and of the Constitution of the United States.

By the legislative enactment of La. R.S. 13:3201(B), the limits of the Louisiana long-arm statute have become co-extensive with the limits of constitutional due process. *See Petroleum Helicopters, Inc. v. Avco Corp.*, 513 So. 2d 1188, 1192 (La. 1987). Thus, the sole inquiry into jurisdiction over a nonresident is a one-step analysis of the constitutional due process requirements. *See Superior Supply Company v. Associated Pipe and Supply Company*, 515 So. 2d 790 (La. 1987).

Pursuant to *International Shoe* and its progeny, the bedrock principles for personal jurisdiction over a nonresident defendant requires that the defendant "have certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154 (1945). This fundamental test to satisfy constitutional due process requires that a court evaluate the quality and nature of the defendants' activities in the forum state to

determine whether such contacts justify the state's exercise of its judicial power over the person. *Id.* at 319-21, 66 S.Ct. at 160.

Constitutional Due Process

The due process test first enunciated in *International Shoe* has evolved into a two-part test, the first part being the "minimum contacts" prong, which is satisfied by a single act or actions by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985); *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283 (1958). The nonresident's "purposeful availment" must be such that the defendant "should reasonably anticipate being haled into court" in the forum state. *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d (1980). This "purposeful availment" requirement ensures that the nonresident defendant will not be haled into a jurisdiction solely as a result of a random, fortuitous, or attenuated contact, or by the unilateral activity of another party or a third person. *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987).

The second part of the due process test centers around the fairness of asserting jurisdiction over the defendant. Even when minimum contacts exist, the exercise of personal jurisdiction over a nonresident defendant

will fail to satisfy due process requirements if the assertion of jurisdiction offends "traditional notions of fair play and substantial justice." *International Shoe,* 326 U.S. at 316, 66 S.Ct. 154.

Specific versus General Jurisdiction

In interpreting the due process clause, the United States Supreme Court has recognized a distinction between two types of personal jurisdiction, namely "general" and "specific" jurisdiction. *de Reyes v. Marine Management and Consulting, Ltd.,* 586 So. 2d 103 (La. 1991). Specific jurisdiction over a nonresident defendant is appropriate when that defendant has purposefully directed its activities at residents of the forum state and the litigation results from alleged injuries that arise out of or relate to those activities. *Burger King,* 471 U.S. at 473 n.8. General jurisdiction, on the other hand, will attach where the nonresident defendant's contacts with the forum state, although not related to the plaintiff's cause of action, are continuous and systematic. *Id.*

We agree with the court of appeal's classification of this case as one dealing with the issue of specific, not general, jurisdiction. The record before us fails to establish that the nonresident defendants had "continuous and systematic" contacts with the state of Louisiana, which would make general jurisdiction appropriate. However, we reiterate that the classification of general versus specific jurisdiction merely serves as an analytical tool to categorize the degree of interrelation between the defendant's activities, the forum, and the cause of action; the same two-part due process evaluation must be conducted

considering the facts in each individual case. *de Reyes*, 586 So. 2d at 109.

Minimum Contacts

The primary issue in this case is whether the "minimum contacts" prong of the due process test can be met when the parties corresponded by electronic means to arrive at a contract for purchase of real estate located in another jurisdiction. The determination of whether minimum contacts exist requires a factual examination of the "relationship among the forum, the defendant, and the litigation." *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2580, 53 L.Ed.2d 683 (1977). The defendants argue that the only factor in support of exercising jurisdiction is the choice of law provision electing Louisiana law, which is insufficient to satisfy minimum contact requirements. While we agree that a choice of law provision alone is insufficient to establish the requisite minimum contacts, the choice of law provision coupled with other facts in this case can do so.

In cases involving contracts, the exercise of jurisdiction requires an evaluation of the following factors surrounding the contract and its formation: (1) prior negotiations between the parties; (2) contemplated future consequences of the contract; (3) the terms of the contract; and (4) the parties' actual course of dealing. *See Burger King*, 471 U.S. at 477-79, 105 S.Ct. at 2185. An individual's contract with an out-of-state party alone cannot establish minimum contacts in the home forum. *Id.*

In concluding that the defendants initially "reached out" to the plaintiff through the Wall Street Journal, we

disagree that the advertisement was fortuitous, rather than targeted activity toward Louisiana residents. The defendants advertised in the Central Edition of the Wall Street Journal, presumably designed to target consumers in the central United States, in relatively close proximity to the real estate for sale in Texas. Bryan's affidavit confirms that the edition at issue was delivered to Shreveport. Defendants offered no evidence to prove that the advertisement ran in other editions of the Wall Street Journal to support the argument that the advertisement was made to a national audience, or that the advertisement had "worldwide circulation."

More importantly, once the plaintiff made contact based on the advertisement, the contract executed between the parties was the product of extensive negotiation via telephone, facsimile, and written documents sent by overnight couriers between the California defendants and the Louisiana plaintiff. Prior to executing the contract, the defendants provided significant amounts of financial information to show the commercial viability of the Texas property as a rental investment property. This information correlated directly with the plaintiff's decision to purchase the property.

After the agreement was executed, the defendants continued to provide the plaintiff with financial information on the property. While the defendants argue that the contract provided for inspection of documents to occur at the Seller's location or the location of the property, the parties' actual course of dealing continued as it had before the agreement was executed.

Further, the terms of the contract support an exercise of personal jurisdiction over the defendants. A "choice-of-law" clause of the contract freely negotiated between the parties designated Louisiana law as the law of the contract. Further, the only location specifically listed for performance under the agreement required that the title insurance commitment be "secured by the Seller, in coordination with the Purchaser's attorney, through the office of the Escrow Agent, and the order for the commitment shall be placed only through the *New Orleans regional office* of First American Title Insurance Company. . . . " (Emphasis added).

We additionally note the fact that the California defendants retained First American as the escrow agent, a corporation designated to act on behalf of the defendants, who happens to be authorized to do business both in Texas and Louisiana. For performance of the contract, the parties were to execute the closing at the offices of the escrow agent, who apparently has offices in both Texas and Louisiana.

We find the physical location for execution of the contract to be inconclusive in determining personal jurisdiction. *See Hunter v. Meyers*, 96-1075 (La.App. 1st Cir. 3/27/97), 691 So. 2d 318. In today's commercial world, business deals are executed routinely with the parties never meeting face to face. The execution of the contract in this case took place in Louisiana and California when each party signed the contract on June 14th, 1999.

Lower court decisions cited by the plaintiff that consider facts similar to those in this case align with our decision today. *See, e.g., Griffin v. French*, 97-2635 (La.App.

1st Cir. 12/28/98), 723 So. 2d 1140, *writ denied*, 99-0220 (La. 3/19/99), 740 So. 2d 116 (finding minimum contacts sufficient to exercise personal jurisdiction over an out-of-state lawyer who solicited class-action plaintiffs in Louisiana through telephone calls and mailings, and mailed them a contract to sign, even though his offices were in Wisconsin, the class-action suit was filed in New York, and there was no evidence that the attorney ever set foot in this state); *Bordelon, Hamlin Theriot v. Burlington Broadcasting*, 94-1839 (La.App.4th Cir. 3/16/95), 652 So. 2d 1082 (finding business negotiations through telephone calls, facsimiles, and mailings were sufficient to satisfy minimum contacts requirements); *Traigle v. Imhoff*, 96-325 (La.App. 5th Cir. 10/1/96), 683 So. 2d 766 (finding minimum contacts where Arizona seller of ostrich eggs, with no offices in Louisiana, solicited through an advertisement placed in a magazine with Louisiana subscribers, and defendants corresponded with Louisiana residents by mail and fax).

The defendants' contacts were not so attenuated to such a degree that they should not "reasonably anticipate being haled into court," *World Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. at 567, in this state simply because the contract in question contemplated an "isolated" sale of land. While the location of the real estate arguably would support a finding of personal jurisdiction by a Texas court, the location of the subject matter involved under the contract is not, in our view, outcome-determinative.

The alleged breach of contract involves the termination of the agreement and whether the plaintiff followed the notice requirements. The letter requesting termination indicates that the plaintiff terminated the agreement

because additional financial information received after the agreement was executed indicated a less lucrative deal than the plaintiff originally believed. While we make no opinion on the merits, we note the substance of the argument to reject the idea that the physical location of the property in Texas is a material issue in this case. *See, e.g., Hunter,* 691 So. 2d 318 (finding the requisite minimum contacts to create Louisiana personal jurisdiction based on negotiations concerning a sale of a horse located in New Jersey by a New York resident to a Louisiana resident via a Florida broker, even though neither the broker, the seller, nor the horse was located in Louisiana).

The court of appeals and defendants' reliance on *Calahan v. Haspel,* 99-44 (La.App. 3d Cir. 5/5/99), 732 So. 2d 796, was misplaced. In that case, Louisianians, who owned property in Texas, entered into a lease agreement with Texans while all parties were physically present in Texas. When the Texas renters defaulted, the property owners filed suit in Louisiana. However, in that case, the only real contact the defendants had with Louisiana occurred when the defendants remitted lease payments to a Louisiana mailing address, or traveled to visit family in Louisiana. Because the agreement was both negotiated and consummated outside Louisiana, the lower court rightly found that the defendants' contacts with this state were too attenuated because the contacts with the forum state were irrelevant to the core dispute.

In the present case, however, the extensive negotiations leading to the purchase agreement, the contract's express terms, and the defendants' hiring of an agent authorized to do business in Louisiana hardly describe a "random," "fortuitous," or "attenuated" relationship

with this state. *Hunter*, 691 So. 2d at 322; *Burger King*, 471 U.S. at 474, 475, 480, 486, 105 S.Ct. at 2183, 2186, 2189; *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984). Moreover, unlike the individuals involved in *Calahan*, the parties to this dispute are sophisticated commercial corporations dealing in multimillion dollar commercial real estate. The defendants were fully aware that they were dealing with Louisiana residents and voluntarily subjected themselves to Louisiana law.

Thus, considering all these factors, Pegasus "purposefully avail[ed] itself of the privilege of conducting activities within [this state]." *Burger King*, 471 U.S. at 475, 105 S.Ct. 2174. Undoubtedly, through this purposeful availment, Pegasus "should reasonably [have] anticipate[d] being haled into court" in Louisiana. *World Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. 559.

Once the plaintiff meets his burden of proving minimum contacts, the burden shifts to the defendants to prove the assertion of jurisdiction would be so unreasonable in light of "traditional notions of fair play and substantial justice" to overcome the presumption of reasonableness created by the defendant's minimum contacts with the forum. *de Reyes*, 586 So. 2d at 107.

Fair Play and Substantial Justice

In determining the issue of fundamental fairness, we must examine (1) the defendant's burden; (2) the forum state's interest in the dispute; (3) the plaintiff's interest in convenient and effective relief; (4) the judicial system's interest in efficient resolution of controversies; and (5) the

state's shared interest in furthering fundamental social policies. *Asahi*, 480 U.S. at 112, 107 S.Ct. 1026; *World Wide Volkswagen*, 444 U.S. at 292, 100 S.Ct. 559. Those considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than that required otherwise. *Burger King*, 471 U.S. at 477, 105 S.Ct. At 2185. The fairness component is comprised mainly of the burden on the defendant to defend a suit in the forum minus the interests of the plaintiff and the state to have the suit litigated in the forum. *de Reyes*, 586 So. 2d at 107.

In light of these considerations, we conclude that the assertion of jurisdiction over these defendants hardly offends "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316, 66 S.Ct. at 158. For the California defendants, they are faced with the same inconveniences whether they must litigate in Louisiana or Texas.

In contrast, Louisiana has a significant interest in ensuring that its resident citizens are afforded the protections of Louisiana law. While we acknowledge that courts in every state routinely apply the law of other jurisdictions, we see no reason for Texas to apply Louisiana law to a breach of contract action simply because the subject matter of the contract is physically located in Texas.

Subject Matter Jurisdiction

The defendants contend that Texas has subject matter jurisdiction because both the immovable property involved in the sale and the bank holding the disputed funds are located there. Like their position on personal

jurisdiction, the defendants appear to argue that because another state has subject matter jurisdiction, Louisiana is precluded from asserting jurisdiction. However, La. Const. art. V, § 16(A) vests jurisdiction over all civil and criminal matters in the courts of Louisiana except as otherwise authorized by the Constitution. A cause of action alleging breach of contract, regardless of the contract's subject matter, is a civil matter falling within our jurisdiction. Accordingly, the defendants' exceptions to subject matter jurisdiction are overruled.

DECREE

Accordingly, we reverse the Second Circuit Court of Appeal and the trial court judgments. The case is remanded to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

KIMBALL, J., Dissenting.

I respectfully disagree with the majority's conclusion that the actions of the foreign defendants here were sufficient to make them subject to personal jurisdiction in Louisiana. In my view, the majority overlooks the importance of the fact that the business relationship between the parties began when the Louisiana resident reached out from this forum to contact the foreign defendants.

La. R.S. 13:3201, the statutory basis for Louisiana's exercise of personal jurisdiction over nonresidents, provides in pertinent part as follows:

> A. A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from any one of the following activities performed by the nonresident:
>
> (1) Transacting any business in this state.
>
> * * *
>
> B. In addition to the provisions of Subsection A, a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and of the Constitution of the United States.

This court recently confirmed that, under La. R.S. 13:3201(B), the Louisiana long-arm statute and constitutional due process are coextensive, such that " 'the sole inquiry into jurisdiction over a nonresident is a one-step analysis of the constitutional due process requirements.' " *Ruckstuhl v. Owens Corning Fiberglass Corp.*, 98-1126 (La. 4/13/99), 731 So.2d 881 (quoting *Petroleum Helicopters, Inc. v. Avco Corp.*, 513 So.2d 1188, 1192 (La. 1987)).

Ruckstuhl, this court's most recent pronouncement on the issue of personal jurisdiction, provides the framework for analyzing the issue of personal jurisdiction over a nonresident defendant. In *Ruckstuhl*, we employed a two-step analysis: (1) First, the plaintiff must establish that the defendant had sufficient minimum contact with the forum, by which he purposefully avails himself of the privilege of conducting activities within the forum; (2) If

the plaintiff proves the defendant had sufficient contact with the forum, a presumption of reasonableness of jurisdiction arises, and the burden shifts to the defendant to show that the assertion of jurisdiction based on the defendant's contacts with the forum would be unreasonable in light of traditional notions of fair play and substantial justice. 731 So.2d at 885-86 (citing United States Supreme Court cases).

The facts of this case are neither substantially disputed nor particularly complex. Defendant Pegasus Group (Pegasus), a California company, advertised in the Wall Street Journal for the sale of Texas real estate.[1] Plaintiff A&L Energy, Inc. (A&L), a Louisiana corporation, saw the advertisement and called Pegasus. There was then a period of negotiation between Pegasus and A&L involving telephone, fax and mail communication, after which the parties agreed to the sale of the Texas real estate. The parties executed a contract for the sale of the property, which contract provided that Louisiana law would govern any dispute. Funds were then transferred from A&L's Louisiana accounts to Texas and California banks.

In concluding that Pegasus had sufficient minimum contacts with Louisiana, the majority rests its decision on several of these facts. First, the majority points to Pegasus' advertisement in the central edition of the Wall Street Journal, "presumably designed to target consumers

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[1] Two other California entities, Central Self Storage Investors and CSS Hempstead, are also involved. For the sake of convenience and brevity, I have referred herein to the California defendants collectively as "Pegasus."

in the central United States, in relatively close proximity to the real estate for sale in Texas." (Slip op. at p. 7.) Next, the majority cites Pegasus' negotiations with A&L after A&L had contacted Pegasus to answer the advertisement. Finally, the majority notes that the contract for sale of the property included a "choice-of-law" section providing that Louisiana law would govern any dispute between the parties.

The majority finds that these three factors, when considered together, constitute sufficient minimum contacts by Pegasus with Louisiana. In support of this finding, the majority cites three decisions of the courts of appeal which purportedly "align" with the majority decision. (Slip op. at pp. 8-9.) Close examination of these cases and others, though, reveals an important distinction: The cases finding sufficient contacts between the foreign defendants and this forum each involved a defendant who reached into Louisiana for the specific purpose of making contact with a resident or residents of this state.

In *Griffith v. French*, 97-2635 (La.App. 1 Cir. 12/28/98), 723 So.2d 1140, a Wisconsin attorney filed a class action in New York on behalf of investors, some 70 individuals in 23 states (one of which was Louisiana), in a Texas real estate scheme. When class certification was denied, the Wisconsin attorney solicited the Louisiana plaintiffs individually about representation. He mailed the Louisiana plaintiffs a retainer agreement, which they executed in Louisiana and returned to the attorney, along with a $500.00 fee. During his representation of plaintiffs, the Wisconsin attorney corresponded with them by mail

and solicited additional legal fees. He was never physically present in Louisiana.

The district court sustained the Wisconsin attorney's exception of lack of personal jurisdiction, and the court of appeal reversed. The court found that the attorney had solicited business in the state, and thus availed himself of the benefit of doing business in Louisiana. What distinguishes *Griffith* from the instant case is the fact that the Wisconsin attorney in *Griffith* personally contacted the Louisiana plaintiffs to solicit them as clients, while here the Louisiana plaintiffs contacted the defendants based on an advertisement in a national publication.

In *Traigle v. Imhoff*, 96-325 (La.App. 5 Cir. 10/1/96), 683 So.2d 766, Louisiana plaintiffs invested money with a Louisiana defendant as part of an ostrich egg venture. When the deal soured, plaintiffs sued defendant, and defendant filed a third party demand against an Arizona ostrich ranch, asserting that the ranch had converted plaintiffs' funds. The ranch was organized as an Arizona corporation and had no offices or registered agent for service of process in Louisiana. The ranch filed an exception of lack of personal jurisdiction, arguing that, while there was a contract in effect between the ranch and the plaintiffs, neither the ranch nor the ostriches were ever in Louisiana, and the ranch thus had no minimum contacts with this state.

The district court found that personal jurisdiction was lacking, but the court of appeal reversed. The court of appeal found that the ranch had two key contacts with Louisiana: the ranch was involved in a joint venture with the LA defendant, and the ranch advertised its services in

a national magazine with several subscribers in Louisiana. A & L here suggests that *Traigle* stands for the proposition that a foreign defendant can open himself to personal jurisdiction simply by advertising its services in a national magazine and then contracting with a Louisiana resident based on those advertisements, but there was more contact with Louisiana in *Traigle* than there was here, *i.e.*, the existence of a joint venture between the ranch and the Louisiana defendant.

In *Bordelon, Hamlin, Theriot & Bourg v. Burlington Broadcasting*, 94-1839 (La.App. 4 Cir. 3/16/95), 652 So.2d 1082, a Louisiana attorney with expertise in FCC issues was contacted by an Iowa attorney whose client (an Iowa broadcaster) needed an experienced FCC lawyer. Negotiations between the attorneys was via telephone, fax and mail. The Louisiana attorney made one trip to Iowa, but the Iowa attorney never came to Louisiana. The Louisiana attorney did the substantive work on the case in New Orleans; the work and revisions were then sent back and forth between Iowa and New Orleans. The Louisiana attorney sued the Iowa attorney and the Iowa broadcaster for legal fees, and the Iowa defendants excepted to personal jurisdiction.

The city court maintained the defendants' exception of lack of personal jurisdiction, and the court of appeal reversed, finding that there were sufficient contacts between the Iowa defendants and Louisiana. While *Bordelon* is similar to the instant case in that the defendants never entered Louisiana, the key distinction is that the defendants in *Bordelon* reached into this forum to personally contact the Louisiana attorney; the Louisiana attorney did not call the Iowa defendants to offer his services.

Another analogous case cited by the majority is *Hunter v. Meyers*, 96-1075 (La.App. 1 Cir. 3/27/97), 691 So.2d 318, which involved the purchase of a horse by Louisiana residents from a New York resident. In *Hunter*, the New York seller retained a Florida broker to sell his racehorse. The broker contacted two trainers in Louisiana to notify them of the sale. One of the trainers was the trainer for the Louisiana purchasers, and he informed them about the horse for sale. The Florida broker eventually contacted the Louisiana purchasers directly, and negotiations were conducted via phone, fax and mail. A bill of sale was signed in Louisiana by the purchasers and returned to the Florida broker. On learning that the horse had medical problems, the Louisiana purchasers sued to reduce[ ] the purchase price, and the defendants excepted to personal jurisdiction.

The district court granted the exception and the court of appeal reversed. The court of appeal focused on the existence of an ongoing relationship between the seller's broker and the Louisiana trainers, as well as the fact that the seller (through his agent) directly solicited the sale in Louisiana. Again, contrary to the instant case, the foreign defendants in *Hunter* purposefully reached into the forum to initiate contact with Louisiana residents.

What distinguishes the instant case from these earlier pronouncements on personal jurisdiction is the fact that here the Louisiana resident initiated contact with the foreign defendant. Pegasus did not reach into this forum to contact A&L to offer the Texas real estate for sale. Rather, Pegasus placed an advertisement in a newspaper of broad circulation, and A&L reached *out* from this forum to contact Pegasus. The business relationship

between the parties was initiated by the Louisiana resident, A&L, and was based on a lone real estate sale. Lacking some purposeful availment by Pegasus of the privilege of doing business in this forum, I cannot agree with the majority that Pegasus had sufficient contact with Louisiana to subject it to personal jurisdiction here. *See Burger King Corp. v. Rudkiewicz,* 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1995).

Additional Louisiana and federal cases support the proposition that being contacted by a Louisiana resident to contract for property or services will be insufficient to subject a nonresident to personal jurisdiction in this forum. *See, e.g., Landry v. Gibbens,* 95-0379 (La.App. 4 Cir. 11/16/95), 665 So.2d 1176 (California heirloom seller, who advertised in specialized national magazine but had made no prior sales in Louisiana, not subject to personal jurisdiction); *Dickson Marine, Inc. v. Panalpina, Inc.,* 961 F.Supp. 947 (E.D.La. 1997) (finding no personal jurisdiction over foreign ship repairer with no operations in this state where contact was initiated by Louisiana company); *St. Martin & Mahoney v. Patton,* 863 F.Supp. 311 (E.D.La. 1994) (finding no personal jurisdiction where Louisiana purchaser contacted Michigan seller to purchase his airplane, where seller had listed his plane with a national broker and advertised in a national publication, but had no contacts with Louisiana and was not a professional seller of airplanes).

The majority today essentially holds that a foreign defendant who negotiates and contracts with a Louisiana resident will always be subject to personal jurisdiction in this forum, even when the Louisiana resident reaches out

from this forum to do business with the foreign defendant. In my view, this result is contrary to the "traditional notions of fair play and substantial justice" underlying the principle of long-arm jurisdiction. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154 (1945). As such, I respectfully dissent from the majority opinion and would affirm the judgment of the court of appeal, sustaining Pegasus' exception of lack of personal jurisdiction and dismissing A&L's suit.

Judgment rendered November 3, 2000
Application for rehearing may be filed within the delay allowed by art. 2166, La. C.C.P.

No. 34,222-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * *

A & L ENERGY, INC. — Plaintiff-Appellant

Versus

PEGASUS GROUP, CENTRAL SELF STORAGE INVESTOR, III, CSS-HEMPSTEAD AND FIRST AMERICAN TITLE INSURANCE COMPANY — Defendants-Appellees

* * *

Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Trial Court No. 443,790

Honorable Frank H. Thaxton, III, Judge

* * *

McCOY, ROBERTS & BEGNAUD, LTD — Counsel for Appellant
By: Mark A. Begmaud
Kenneth D. McCoy, Jr.

MAYER, SMITH & ROBERTS, L.L.P. By: Deborah Shea Baukman STEVEN C. POLGAR	Counsel for Appellees Pegasus Group, Central Self Storage Investors, III, and CSS-Hempstead
BLANCHARD, WALKER, O'QUIN & ROBERTS By: J. David Garrett	Counsel for Appellee First American Title Insurance Company

* * *

Before NORRIS, GASKINS and DREW, JJ.

NORRIS, C.J., dissents with written reasons.

GASKINS, J.

In this breach of contract suit involving the sale of Texas real estate, the plaintiff appeals an adverse judgment which sustained the exceptions to subject matter jurisdiction and personal jurisdiction filed by three out-of-state defendants. For the reasons set forth below, we affirm the trial court judgment.

FACTS

In the spring of 1999, the president of A&L Energy, Inc. ("A&L"), responded to an advertisement in the Central Edition of the Wall Street Journal by calling the telephone number listed therein. In the advertisement, the defendants offered for sale certain real estate in Houston, Texas. The parties communicated by telephone, and the defendants sent A&L written materials pertaining to the property.

Thereafter, on June 14, 1999, A&L entered into an agreement of purchase and sale of that real estate with Pegasus Group ("Pegasus"), a California company. Among other things, the agreement provided that it would be governed by Louisiana law. Pursuant to the agreement, A&L paid deposits – or earnest money – of $30,000 to First American Title Insurance Company ("First American") and $10,000 to Pegasus. An inspection period of 45 days was set; during this period, A&L could terminate the agreement for any reason and its earnest money would be returned.

During the inspection period, A&L notified Pegasus of its decision to terminate the agreement. However, Pegasus refused A&L's request to return the earnest money held by it or First American. Apparently these funds are on deposit in banks in Texas and California.

On September 24, 1999, A&L filed suit in Caddo Parish, Louisiana, against four out-of-state parties – Pegasus, a California legal entity; Central Self Storage Investors, III, a California limited partnership; CSS-Hempstead, also a California limited partnership; and First American, a California title insurer authorized to do business in Louisiana and Texas.[1] According to the allegations of A&L's petition, Pegasus was initially an undisclosed agent for Central Self Storage Investors, III, and CSS-Hempstead. In the suit, A&L sought the return of its earnest money, plus interest, as well as attorney fees allowed under the terms of the contract.

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[1] First American received an extension of the time to plead and, as of August 2000, had not made an appearance or filed an answer in the trial court.

On November 3, 1999, Pegasus Central Self Storage Investors, III, and CSS-Hempstead jointly filed exceptions to personal and subject matter jurisdiction. They contended that the proper subject matter jurisdiction is in Harris County, Texas, the location of both the immovable property involved in the sale and the bank where some of the funds in dispute are on deposit. As to personal jurisdiction, they asserted that all exceptors are California legal entities which have never been licensed to do business in Louisiana and which have never done business or engaged in any business activity in Louisiana which would satisfy the minimum contact requirements. They argued that while they agreed in the contract that it would be construed according to Louisiana law, they did not agree that venue or jurisdiction in Louisiana was proper.

In opposition to the exceptions, A&L filed an affidavit by Rex Bryan, a principal in Lea Hall Properties, the agent for A&L, setting forth the actions in Louisiana pertaining to the agreement.

In May 2000, the trial court sustained the exceptions. The court found that even though the parties to the contract agreed that Louisiana law would be applied to resolve disputes between the parties, such an agreement did not provide the court with subject matter or personal jurisdiction under the facts presented in the instant case. The judgment also provided that the parties could agree to transfer the action to a court of appropriate jurisdiction within 15 days of the judgment becoming final. Otherwise, the case would be dismissed without prejudice at the plaintiff's cost.

A&L appealed.

PERSONAL JURISDICTION

Law

The appellate court conducts a *de novo* review of the legal issue of personal jurisdiction over a nonresident by a Louisiana court. *Hunter v. Meyers*, 96-1075 (La. App. 1st Cir. 3/27/97), 691 So. 2d 318; *Griffith v. French*, 97-2635 (La. App. 1st Cir. 12/28/98), 723 So. 2d 1140, *writ denied*, 99-0220 (La. 3/19/99), 740 So. 2d 116. However, the trial court's factual findings underlying the decision are reviewed under the manifest-error standard of review. *Griffith, supra.*

The Louisiana long-arm statute, La. R.S. 13:3201 provides, in relevant part:

> A. A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from any one of the following activities performed by the nonresident:
>
> (1) Transacting any business in this state,
>
> . . . .
>
> B. In addition to the provisions of Subsection A, a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and of the Constitution of the United States.

Under the express terms of the long-arm statute, the sole inquiry into personal jurisdiction over a nonresident involves an analysis of the constitutional due process requirements. *Griffith, supra; Superior Supply Company v. Associated Pipe and Supply Company*, 515 So. 2d 790 (La. 1987). Due process requires that in order to subject a

nonresident defendant to a personal judgment, the defendant must have certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *de Reyes v. Marine Management and Consulting, Ltd.*, 586 So. 2d 103 (La. 1991).

In interpreting the due process clause, the United States Supreme Court has recognized a distinction between two types of personal jurisdiction – "general" and "specific" jurisdiction. *de Reyes, supra; Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L.Ed.2d 528 (1985). Specific jurisdiction over a nonresident defendant is appropriate when that defendant has purposefully directed its activities at residents of the forum state and the litigation results from alleged injuries that arise out of or relate to those activities. *Burger King, supra; de Reyes, supra; Hollis v. Info Pro Technology*, 33,606 (La. App. 2d Cir. 6/21/00), 764 So. 2d 184. General jurisdiction, on the other hand, will attach where the nonresident defendant's contacts with the forum state, although not related to the plaintiff's cause of action, are continuous and systematic. *Hollis, supra.*

The due process test has evolved into a two-part test, the first part being the "minimum contacts" prong, which is satisfied by a single act or actions by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Burger King, supra; Ruckstuhl v. Owens Corning Fiberglas Corp.*, 98-1126 (La. 4/13/99), 731 So. 2d 881. The nonresident's "purposeful availment" must be such that the defendant "should reasonably anticipate being haled into court" in

the forum state. *Ruckstuhl, supra.* The "purposeful availment" requirement ensures that the nonresidential defendant will not be haled into a jurisdiction solely as a result of a random, fortuitous, or attenuated contact, or by the unilateral activity of another party or a third person. *de Reyes, supra.*

The second part of the due process test centers around the fairness of the assertion of jurisdiction. Hence, once the plaintiff meets his burden of proving minimum contacts, "a presumption of reasonableness of jurisdiction arises" and "the burden then shifts to the opposing party to prove the assertion of jurisdiction would be so unreasonable in light of traditional notions of fair play and substantial justice as to overcome the presumption of reasonableness created by the defendant's minimum contacts with the forum." *de Reyes, supra; Ruckstuhl, supra.*

Once it is established that the defendant has "minimal contacts," those contacts may be considered in light of certain factors in determining whether the assertion of personal jurisdiction comports with notions of fair play and substantial justice. Those factors are: (1) the burden on the defendant, (2) the forum state's interest in the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining an efficient resolution of controversies, and (5) the states' shared interest in fostering fundamental substantive social policies. *Burger King, supra; Griffith, supra; Bordelon, Hamlin, Theriot & Hardy v. Burlington Broadcasting, Ltd.*, 94-1839 (La. App. 4th. Cir. 3/16/95), 652 So. 2d 1082. Those considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than that required otherwise. *Burger*

King, supra. The fairness component is comprised mainly of the burden of the defendant to defend a suit in the forum minus the interests of the plaintiff and the state to have the suit litigated in the forum. *de Reyes,* 586 So. 2d at 107; *Bordelon, Hamlin, Theriot & Hardy, supra.*

Discussion

We note at the outset that we are dealing with the possibility of specific, not general, jurisdiction in this matter. There is nothing before us to suggest that the nonresident defendants had "continuous and systematic" contacts with the state of Louisiana, thus making general jurisdiction appropriate. However, specific jurisdiction in Louisiana over these California-based defendants could be appropriate if those defendants *purposefully* directed their activities at a Louisiana resident and the litigation resulted from alleged injuries arising out of or relating to those activities.

In *Calahan v. Haspel,* 99-44 (La. App. 3d Cir. 5/5/99), 732 So. 2d 796, Louisiana owners advertised a Texas house for sale in a Texas newspaper and ultimately leased it to Texas residents with an option to buy. Rental payments were sent to the owners in Louisiana. After the lessees defaulted on the rent and moved out, the owners filed suit in Louisiana. The court found that the defendants' ties with Louisiana were attenuated, that it was "merely fortuitous" that the owners of this Texas property lived in Louisiana and that the rental payments were sent to them in Louisiana. It concluded that exercising personal jurisdiction over the defendants would offend "traditional notions of fair play and substantial justice."

While the defendants in the instant case advertised their offer to sell Texas real estate in a publication with a wide circulation, they did not specifically target a Louisiana resident. When contacted by the plaintiff in response to the advertisement, they sent materials pertaining to the property and ultimately entered into a contract with the plaintiff. This sale was an isolated transaction involving the sale of real estate property in another state. There is nothing in the record to suggest the existence of any continuing obligations or relationships in Louisiana. See and compare *Superior Supply Company, supra; Hunter, supra; Bordelon, Hamlin, Theriot & Hardy, supra;* and *Traigle v. Imhoff,* 96-325 (La. App. 5th Cir. 10/1/96), 683 So. 2d 766.

In the *Burger King* case, the Supreme Court declared: "If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot [emphasis theirs]." Likewise, we do not believe that the contract in the instant case – a fortuitous and isolated sale of out-of-state real estate – is alone sufficient to satisfy the minimum contacts test. We further find that to require the California defendants to defend themselves in a Louisiana court in this suit concerning Texas real estate would offend the traditional notions of fairness and justice.

SUBJECT MATTER JURISDICTION

Due to or resolution of the issue of personal jurisdiction, we pretermit the issue of subject matter jurisdiction as unnecessary.

CONCLUSION

The judgment of the trial court is affirmed. Costs are assessed against the appellant.

AFFIRMED.

NORRIS, Chief Judge, dissents with reasons.

I respectfully dissent. The determination of whether minimum contacts exist requires a factual examination of the "relationship among the forum, the defendant, and the litigation." *Shaffer v. Heitners*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2580 (1977). Such an examination seems to be lacking in the majority's analysis, and if properly conducted, it would prove minimum contacts did indeed exist between the defendants and this state.

Although it is true that the defendants initially "reached out" to the plaintiffs through the *Wall Street Journal*, and therefore did not specifically target Louisiana residents (although it is obvious that at least some Louisianians receive the publication), once contact was made, the contract between the parties was the product of extensive negotiation (also involving counsel) via telephone, facsimile, and written documents sent by overnight couriers between the California-based defendants and the Louisiana plaintiffs. The money (which forms the basis of the current suit) was sent from a Louisiana bank to an escrow agent in Texas and directly to the defendants

in California. A "choice-of-law" clause of the contract-freely negotiated between the parties designated Louisiana law as the law of the contract.

As such, *Dooley v. United Technologies, Corp.*, 786 F.Supp. 65 (D.D.C. 1992), is particularly instructive, for that case, which interpreted a provision of the District of Columbia long-arm statute analogous to La.R.S. 13:3201 A, found that telephone calls and mailings to the forum were held to be "transacting business." Louisiana courts have held similarly; for example, an out-of-state lawyer who solicited class-action plaintiffs in Louisiana through telephone calls and mailings, and mailed them a contract to sign, was seen to have minimum contacts here, even though his offices were in Wisconsin, the class-action suit filed in New York, and there was no evidence that he ever set foot in this state. *Griffin v. French*, 97-2635 La.App. 1st Cir. 12/28/98), 723 So. 2d 1140, *writ denied*, 99-0220 (La. 3/19/99), 740 So. 2d 116. Likewise, telephone calls, facsimiles, and mailings sent to and from Louisiana as part of business negotiations were held to be sufficient to satisfy minimum contacts requirements. *Bordelon, Hamlin Theriot v. Burlington Broadcasting*, 94-1839 (La.App. 4th Cir. 3/16/95), 652 So. 2d 1082; *see also, Traigle v. Imhoff*, 96-325 (La.App. 5th Cir. 10/1/96), 683 So. 2d 766 (Arizona seller of ostrich eggs, with no offices in Louisiana, held to have minimum contacts where solicitation advertisement was placed in a magazine with Louisiana subscribers and mail/fax correspondence between defendants and Louisiana residents was produced.).

Unlike the majority, I am not persuaded that the defendants' contacts are attenuated to such a degree that they should not "reasonably anticipate being haled into

court," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 567 (1980), in this state simply because the contract in question contemplated an "isolated" sale of land. For example, negotiations concerning a sale of a horse located in New Jersey by a New York resident to a Louisiana resident via a Florida broker was held sufficient to create the requisite minimum contacts to create Louisiana personal jurisdiction, even though neither the broker, the seller, nor the horse was located in Louisiana. *Hunter v. Meyers*, 96-1075 (La.App. 1st Cir. 3/27/97), 691 So. 2d 318. As such, the majority's reliance on *Calahan v. Haspel*, 99-44 (La.App. 3d Cir. 5/5/99), 732 So. 2d 796, is misplaced. In that case, Louisianians, who owned property in Texas, entered into an agreement with Texans (while all parties were physically in Texas) to lease property located in Texas. When the Texas renters defaulted, the property owners filed suit in Louisiana. Since the only real contact the defendants had with Louisiana was remitting of lease payments to a Louisiana mailing address and the agreement was negotiated and consummated outside Louisiana, the court rightly found that the defendants' contacts with this state were attenuated, for in reality, where the payments were sent to was irrelevant to the core dispute. In the present case, however, the extensive negotiations leading to the contract in question – where the defendants were fully aware that they were dealing with Louisiana residents and voluntarily subjected themselves to Louisiana law – are hardly a "random," "fortuitous," or "attenuated" relationship with this state as the majority suggests. *Hunter, supra* at 322; *Burger King*, 471 U.S. at 474, 475, 480, 486, 105 S. Ct. at 2183, 2186, 2189; *Keeton v. Hustler Magazine, Inc.*, 465

U.S. 770, 774, 104 S. Ct. 1473, 1478 (1984). Similarly, assertion of jurisdiction over these defendants hardly offends "traditional notions of fair play and substantial justice." *Int'l Shoe v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945).

I would reverse.

A & L Energy, Inc.	*	Number 443, 790-C
Versus	*	First Judicial District
Pegasus Group, et al	*	Court
	*	Caddo Parish, Louisiana

JUDGMENT

(Filed May 11, 2000)

The defendants in this case filed Exceptions of Lack of Personal and Subject Matter Jurisdiction. Those exceptions were set for hearing November 29, 1999. However, the Clerk of Court notified counsel for plaintiff that the exceptions were set for November 22, 1999. The clerk's minutes do not reflect that the case was submitted on either November 22, or November 29, 1999, and the case was not on the court's docket for either date. Apparently the case was never presented to the court for decision.

Both parties have submitted briefs addressing the merits of the exceptions. This court has now considered the entire record, the argument of counsel, and the applicable law:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that even though the parties have by contract agreed that Louisiana shall be applied to resolve any disputes between the parties, such an agreement does not provide this court with subject matter or personal jurisdiction over the defendant under the facts presented. The Exceptions of Lack of Personal and Subject Matter Jurisdiction are sustained.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties may agree to transfer this

action to a court with subject matter and personal jurisdiction over the defendant within 15 days of this judgment becoming final. In lieu of such an agreement, this matter is to be dismissed, without prejudice, at plaintiff's cost.

JUDGMENT READ, RENDERED AND SIGNED in chambers on this 11th day of May, 2000.

/s/ Frank H. Thaxton, III
District Judge

Please provide all parties with Notice of Judgment

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Siskiyou Props., LLC v. Bennett Holdings, LC

No. 99-36175

2001 U.S. App. LEXIS 14429

May 11, 2001, Argued and Submitted, Portland, Oregon
June 25, 2001, Filed

NOTICE: RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the District of Oregon. D.C. No. CV 99-01062-GMK, Garr M. King, District Judge, Presiding.

DISPOSITION: AFFIRMED.

JUDGES: Before: GOODWIN, GREENBERG,** and RAWLINSON, Circuit Judges.

OPINION: MEMORANDUM*

In this action for breach of contract in the purchase of a shopping mall, **Siskiyou**, the Oregon plaintiff, appeals the district court's order that granted the motion of **Bennett**, an Idaho citizen, to dismiss for lack of personal jurisdiction. Bennett, the seller, argues that the district

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** The Honorable Morton I. Greenberg, United States Circuit Judge for the Third Circuit, sitting by designation.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

court did not have personal jurisdiction and, in the alternative, that it also lacked subject matter jurisdiction. This Court reviews de novo the district court's dismissal of a case for lack of jurisdiction. *See United States v. Ruiz-Alvarez*, 211 F.3d 1181, 1184 (9th Cir. 2000). In a diversity case, the district court's job is to predict how the forum state's highest court would interpret and apply the relevant state law. *See Stanford Ranch, Inc. v. Maryland Casualty Co.*, 89 F.3d 618, 624 (9th Cir. 1996).

In March 1998, Brent E. Terrell, a real estate agent, telephoned Alan Wells in Corvallis, Oregon. Wells was the agent of Siskyou's predecessor in interest, Eric Bunn, and is a principal of **Siskiyou**. Terrell told Wells that he was soliciting offers to purchase the Eastside Marketplace (hereinafter "the Property") in Idaho.

Shelley **Bennett** and Terrell stated in affidavits that Bennet did not retain Terrell or his firm to sell the Marketplace. Rather, they explain that when Terrell told Shelley Bennett that he he [sic] had a prospective buyer, Bunn, Bennett responded that she and her parents would be willing to look at an offer. Terrell mailed Wells a marketing "package" concerning the property. The package included photographs, financial statements, lease summaries, a site plan, and other information to assist a potential purchaser in evaluating the property.

Bunn communicated to Terrell a purchase offer, but this offer was rejected in favor of a competing offer. When the proposed sale did not close, Terrell and Wells resumed negotiations. Each claims that the other initiated communication. According to Wells, Terrell and Bennett contacted Wells and other employees of Bunn in Oregon

dozens of times by telephone, mail, fax, and email throughout the solicitation, negotiation, and due diligence processes. Terrell maintains that he handled the negotiations with Wells. Wells claims that he communicated principally with Bennett. Wells claims that Terrell and Bennett sent him enough documents to fill many boxes. The parties negotiated for nearly a year.

On or about February 9, 1999, Bunn and **Bennett** entered into an agreement (hereinafter, "the Agreement"), under which **Bennett** would sell the Property to Bunn. (**Siskiyou** is the assignee of Bunn's rights under the Agreement.) **Siskiyou** claims that "the due diligence process eventually resulted in the discovery that Terrell and **Bennett** had misrepresented certain material financial information."

Siskiyou sued for breach of contract. **Bennett** filed a motion to dismiss for lack of personal and subject matter jurisdiction or, in the alternative, for a transfer of venue to the District of Idaho. On November 15, 1999, the district court denied Bennett's motion to dismiss for lack of subject matter jurisdiction, but granted its motion to dismiss for lack of personal jurisdiction, and ruled that Bennett's motion for a change of venue was moot.

Personal Jurisdiction

"Oregon's long-arm statute confers jurisdiction to the extent permitted by due process." *Gray & Co. v. Firstenberg Machinery Co., Inc.*, 913 F.2d 758, 760 (9th Cir. 1990) (citing Or. R. Civ. P. 4L). Thus, the question for this court, as it was before the district court, is whether the assertion

of personal jurisdiction comports with federal due process law.

> Therefore, the narrow, three-part question is:
>
> (1) Did the defendant do some act "by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws?"
>
> (2) Did the claim "arise out of the defendant's forum-related activities?"
>
> (3) Is the exercise of jurisdiction on the facts of the case reasonable?

Gray & Co., 913 F.2d at 760 (quoting *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 380 (9th Cir. 1990). The Ninth Circuit has stated that "the 'purposeful availment' requirement is satisfied if the defendant has taken deliberate action within the forum state or if he has created continuing obligations to forum residents." *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995).

The district court held that Bennett had not purposefully availed itself of the privilege of doing business in Oregon. It concluded that the dealings between the parties "did not create the type of continuing relationship or continuing obligations to Oregon residents or business entities that would allow this court to exercise personal jurisdiction over Bennett." The district court thus held that the exchange of documents and communications between Bennett and Bunn were insufficient to create personal jurisdiction in the absence of a representative or agent of **Bennett** traveling to Oregon as part of the transaction.

Siskiyou argues that **Bennett's** solicitation of bids from an Oregon resident, which involved dozens of phone calls and shipping boxes of documents to Oregon during the negotiation and due diligence phases of the contract, constituted purposeful availment. Certainly those activities cannot be ignored. However, telephone and mail contacts alone have been held to be insufficient to satisfy the purposeful availment test. *See Peterson v. Kennedy*, 771 F.2d 1244, 1262 (9th Cir. 1985).

Turning to the execution of the contract, apparently without a face-to-face meeting in Oregon, Siskyou [sic] contends that the terms of the Agreement demonstrate that Bennett "created 'continuing obligations' between itself and the Oregon buyer." However, again, a contract alone does not automatically provide the required minimum contacts for the exercise of personal jurisdiction. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985).

Nevertheless, we have said: "it is not required that a defendant be physically present within, or have physical contacts with, the forum, provided that his efforts 'are purposefully directed' toward forum residents." *Ballard*, 65 F.3d at 1498 (quoting *Hirsh v. Blue Cross, Blue Shield of Kansas City*, 800 F.2d 1474, 1478 (9th Cir. 1986). As the Supreme Court explained in *Burger King*,

> we have emphasized the need for a 'highly realistic' approach that recognizes that a 'contract' is 'ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.'

Burger King, 471 U.S. at 479.

Under *Burger King*'s approach, the real object of the contract transaction was to place the new owner, Siskyou's [sic] predecessor in interest, in possession of land in Idaho. That part of the activity could be called "purposeful" but it could equally have been accomplished while Bunn, or his agent, Wells, were vacationing in Hawaii, or Fiji. According to Wells, a real estate agent in Oregon who worked for Bunn, the original Oregon purchaser, Terrell, twice sought him out to solicit a bid for the Property. Wells also testified that he received boxes of documents and dozens of letters, faxes, and e-mails in Oregon from Terrell and Bennett. These activities spanned a full year and begin to look like "availment." Wells testified that Bennett contacted other professionals who worked for Bunn, all of whom were located in Oregon in connection with this transaction. However, Bennett argues that it did not direct any general sales effort at Oregon, but merely responded to Bunn's offer to purchase. No principal or agent of **Bennett's** ever visited Oregon. **Bennett** argues that the bulk of the correspondence by **Bennett** was issued in response to **Siskiyou's** expression of renewed interest in the property, and solicited by **Siskiyou** in the Purchase and Sale Agreement for the property. **Bennett** notes that had the transaction been consummated, it would have closed in Idaho with funds disbursed in Idaho, and the conveyance document recorded in an Idaho courthouse.

We agree with the district court that Bennett did not purposefully avail itself of the privilege of doing business in Oregon and that, therefore, the district court lacked personal jurisdiction over Bennett. Because we hold that the district court lacked personal jurisdiction, we need

not reach the questions whether it had subject matter jurisdiction and whether venue was proper. Accordingly, we

AFFIRM.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Siskiyou Props, L.L.C. v. Bennett Holdings L.C.

Civil No. 99-1062-KI

1999 U.S. Dist. LEXIS 17705

November 15, 1999, Decided

NOTICE: NOT FOR PUBLICATION

DISPOSITION: Motion to dismiss by defendant Bennett Holdings, L.C. granted. Alternative motion to transfer to District of Idaho by defendant **Bennett** Holdings, L.C. denied as moot. Motion to file amended complaint by plaintiff **Siskiyou** Properties, L.L.C. denied.

JUDGES: GARR M. KING, United States District Court Judge.

OPINION BY: GARR M. KING

OPINION: OPINION AND ORDER

11/15/99

KING, Judge:

Before the court is the motion to dismiss (# 4-1) or transfer to the District of Idaho (# 4-2) by defendant **Bennett** Holdings, L.C. (**"Bennett)**. In addition, the motion to file amended complaint (# 25) by plaintiff **Siskiyou** Properties, L.L.C. (**"Siskiyou"**) is also pending. For the reasons set forth below, I grant the motion to dismiss and deny the motion to transfer as moot. I also deny the motion to file amended complaint.

FACTS

This is an action brought by an Oregon limited liability company (**Siskiyou**) against an Idaho limited liability company (**Bennett**) related to a contract to sell real property located in Idaho. Bennett entered into a Purchase and Sale Agreement, dated January 28, 1999 (the "Agreement") with Eric Bunn, to set forth the terms of the sale by Bennett to Bunn of the Eastside Marketplace shopping center, located in Moscow, Idaho (the "Property").[1] **Siskiyou** is the assignee of Bunn's rights under the Agreement.

From the text of the Complaint and the parties' briefs and affidavits, it is clear that the Property was never conveyed to Bunn or Siskiyou. In fact, Siskiyou's second claim for relief is for specific performance of the Agreement.[2]

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[1] **Bennett** and Bunn also entered into an amendment of the Agreement on April 15, 1999.

[2] The first claim for relief alleges that Bennett has breached the terms of the Agreement by making misrepresentations about leases to tenants that occupy the Property and about other financial matters. Complaint, P 3. Based on such allegations, Siskiyou alleges that it has been damaged in an amount in excess of $75,000. *Id.*, P 4. What is unclear is how Siskiyou could have incurred such damages when it does not have possession of the Property and is not managing it. Likewise, it is unclear why Siskiyou would want to compel a conveyance of real property that will result in financial damages to **Siskiyou**.

DISCUSSION

Pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(2), respectively, **Bennett** argues that this case should be dismissed because this court lacks subject matter jurisdiction and lacks personal jurisdiction over Bennett. In the alternative, pursuant to Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. §§ 1404(a) and 1406, Bennett argues that the case should be transferred to the District of Idaho on the ground that venue in the District of Oregon is improper and that, regardless, the District of Idaho is a more convenient forum.

I. Motion to Dismiss

A. Subject Matter Jurisdiction

The Complaint does not state the basis for this court's subject matter jurisdiction, but does contain allegations that are clearly intended to demonstrate diversity subject matter jurisdiction. Complaint, P 1 (the parties are limited liability companies from different states and the amount in controversy exceeds $75,000). Given that subject matter jurisdiction is based on diversity, substantive state law governs. Bennett argues that because Siskiyou's objective in this case is to compel the conveyance of real property, this case is a "local action" under Oregon law and thus can only be commenced where the real property is located. Accordingly, because the Property is located in Idaho, Bennett argues that this court lacks subject matter jurisdiction.

> In making this argument, Bennett relies heavily upon ORS 14.030 which states:

> When the court has jurisdiction of the parties, it may exercise it in respect to any cause of action or suit wherever arising, except for the specific recovery of real property situated without this state, or for an injury thereto.

ORS 14.030.

On its face, this statute appears to preclude subject matter jurisdiction. However, Oregon case law dictates the opposite conclusion. Siskiyou cites to the Oregon Supreme Court's statement in *Blue River Sawmills, Ltd. v. Gates*, 225 Or. 439, 476-77, 358 P.2d 239 (1960):

> A court in equity having jurisdiction over the parties, as here, may administer full relief without regard to the nature or situation of the property involved, and may compel action with respect to land which lies beyond its jurisdiction, as by conveyance thereof, provided it can enforce its decree by the exercise of its powers over the person before it.
>
> The principle upon which this jurisdiction rests is that chancery, acting in personam and not in rem, holds the conscience of the parties bound without regard to the situs of the property.

Id. at 476 (internal citations omitted).

Other opinions from the Oregon Supreme Court provide further support for the premise that this court has subject matter jurisdiction under Oregon law. *See Small v. Carey*, 269 Ore. 35, 37-39, 522 P.2d 1202 (1974) (following *Blue River Sawmills* and drawing a distinction between the jurisdiction of Oregon courts to pass judgment on the title to land in another state and jurisdiction over a transitory action or suit in personam aimed at a transaction between

the parties that involves real property outside the state); *see also Williams v. Williams*, 83 Ore. 59, 62, 162 P. 834 (1917) ("No judgment of a court of another jurisdiction can have any effect per se upon the title to land. The only way in which the conveyance of the land beyond the jurisdiction of the court can be effected is by a decree in equity operating upon the person so as to coerce the party."); *Claude v. Claude*, 191 Ore. 308, 335, 228 P.2d 776 (1951) ("The court, we know, is without power to act directly upon the titles [to property located in Idaho], but it is well settled that in a proper case equity may enter its decree in personam and thereby accomplish indirectly the desired result.").[3]

I am unable to reconcile the above authorities with ORS 14.030 and am reluctant to ignore such apparently relevant pronouncements by the Oregon Supreme Court. Accordingly, I decline to grant Bennett's motion to dismiss on the grounds that this court lacks subject matter jurisdiction. Regardless, as discussed below, Bennett need not prevail on its subject matter jurisdiction argument to succeed on its motion to dismiss.

B. Personal Jurisdiction Over Bennett

The plaintiff bears the burden of establishing that the court has personal jurisdiction over the defendant. *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990). If no evidentiary hearing is held, a plaintiff can withstand a motion to

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[3] I note that ORS 14.030 was apparently enacted in 1862. As such, it was in existence at the time that each of the above cases was decided, but was not discussed in any of the opinions.

dismiss by making a prima facie showing of jurisdictional facts which, if true, support jurisdiction over the defendant. *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995). Allegations in the complaint must be taken as true and conflicts between the facts must be resolved in the plaintiff's favor for purposes of deciding whether a prima facie case for personal jurisdiction exists. *American Tel. & Tel. Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir.), opinion supplemented on other grounds, 95 F.3d 1156 (9th Cir. 1996).

Bennett contends that its extremely limited contacts with Oregon are insufficient for this court to exercise personal jurisdiction over it.

1. General Jurisdiction

The jurisdictional reach of the federal court over defendants in a diversity action is determined by the law of the forum state. Oregon extends jurisdiction to the outer limits permitted by the state or federal constitutions. Or. R. Civ. P. 4L. Thus, I can turn to a federal due process analysis. *Gray & Co. v. Firstenberg Mach. Co.*, 913 F.2d 758, 760 (9th Cir. 1990).

Federal due process requires that a nonresident defendant have minimum contacts with the forum state such that the exercise of personal jurisdiction does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945). The constitutional due process test may be satisfied by a finding of either general or specific jurisdiction. *Sher*, 911 F.2d at 1361. Where

a defendant has "substantial" or "continuous and systematic" contacts with the forum state, general jurisdiction is proper even if the cause of action is unrelated to the defendant's forum activities. *Id.*

With its sole purpose being to own and manage the Property, it is clear that Bennett's contacts with Oregon are not substantial, continuous or systematic enough to support general jurisdiction over it. Bennett has no contacts with Oregon other than the few related to this action.

2. Specific Jurisdiction

When general jurisdiction is inappropriate, the Ninth Circuit has recognized application of a three-part test to determine whether specific jurisdiction exists:

> (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws. (2) The claim must be one which arises out of or results from the defendant's forum-related activities. (3) Exercise of jurisdiction must be reasonable.

Gordy v. Daily News, L.P., 95 F.3d 829, 831-32 (9th Cir. 1996).

The "purposeful availment" element ensures that a " 'defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.' " *Id.* at 832 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed.

2d 490, 100 S. Ct. 559 (1980)). The connection between defendant and the forum state must come about "by an action of the Defendant purposefully directed toward the forum State." *Asahi Metal Indus. v. Superior Court of Cal.*, 480 U.S. 102, 112, 94 L. Ed.2d 92, 107 S. Ct. 1026 (1987) (emphasis in original).

The Complaint contains no allegations that are relevant to whether **Bennett** purposefully availed itself of the privilege of conducting business in Oregon. However, one of Siskiyou's principals, Alan Wells, filed a declaration setting forth facts that are relevant to a personal jurisdiction analysis.[4] To make its prima facie case of specific jurisdiction, **Siskiyou** relies on Wells' affidavit and affidavits of Shelley **Bennett** and Brett E. Terrell that were submitted by **Bennett:**

> In this case, the testimony in defendant's own affidavits demonstrates that this court has personal jurisdiction over defendant. For example, Brett Terrell, a real estate agent working for defendant, testifies in paragraph 8 of his affidavit that:
>
> > "Ms. Bennett prepared and updated an information package about Eastside Marketplace, and I sent it to Mr. Wells for Mr. Bunn's review."

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[4] In addition to being a principal of Siskiyou, Wells was Bunn's real estate agent and in charge of negotiations and due diligence with respect to the purchase of the Property. Wells Decl., P 2.

> Mr. Wells was a real estate agent, located in Corvalis, Oregon, working for the Oregon purchaser. *See* Declaration of Alan Wells. In paragraph 12 of his affidavit, Mr. Terrell also admits to contacts with Oregon "by telephone, mail, and facsimile transmission to answer questions and exchange documents." In paragraph 14 of her affidavit, Shelley Bennett confirms that Mr. Terrell was acting on behalf of defendant. In paragraph 9 of her affidavit, Ms. Bennett also confirms that Mr. Terrell "was in contact from time to time with Alan Wells." In his declaration, Mr. Wells testifies that these contacts were substantial, continuous and material to the transaction in issue. Mr. Wells also testifies that he received telephone calls and dozens of letters, facsimile and other transmissions from Mr. Terrell and Ms. Bennett soliciting the sale, helping the Oregon buyer complete its due diligence, and insuring that the sale closed. Mr. Wells testifies that he received enough documents to fill many boxes in his office in Corvalis.

Plaintiff's Opposition Brief, pp. 5-6 (emphasis in original).

Disregarding any conflicting evidence presented by Bennett, the question is whether the above facts are sufficient to establish purposeful availment. When viewed in the light of the additional fact that no representative of **Bennett** ever came to Oregon as part of the transaction, I conclude that **Siskiyou** has not demonstrated purposeful availment.

The existence of a contract with a resident of the forum state is insufficient by itself to create personal jurisdiction

over the nonresident. *Burger King Corp. v. Rudezewicz*, 471 U.S. 462, 478, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985). However, the Supreme Court also stated that "with respect to interstate contractual obligations, we have emphasized that parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." 105 S. Ct. at 2182 (quoting *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 647, 94 L. Ed. 1154, 70 S. Ct. 927 (1950)). Acknowledging this rule of law, the Ninth Circuit has stated that "the 'purposeful availment' requirement is satisfied if the defendant has taken deliberate action within the forum state or if he has created continuing obligations to *forum residents*." *Ballard*, 65 F.3d at 1498.

The interaction between Bennett and Bunn (the original party to the Agreement) was an isolated sale transaction that, despite Wells' characterization, did not create the type of continuing relationship or continuing obligations to Oregon residents or business entities that would allow this court to exercise personal jurisdiction over Bennett. Furthermore, although there may have been a large amount of documentation and communications exchanged between Bennett and Bunn as part of the sale, those contacts are insufficient to create personal jurisdiction in the absence of a representative or agent of Bennett traveling to Oregon as part of the transaction. *See Rabyor v. L&E Associates, Inc., et al.*, 1999 U.S. Dist. LEXIS 16826,

CV 99-561-KI, Slip. Op., 1999 WL 732536 (D. Or. September 21, 1999) (no personal jurisdiction created by interstate correspondence and telephone calls in the absence of defendant's presence in Oregon).

I conclude that **Siskiyou** has not met its burden of establishing that **Bennett** purposefully availed itself of the privilege of conducting activities in Oregon. As such, there is no personal jurisdiction over Bennett and this case must be dismissed.

II. Motion to Transfer

Because this case shall be dismissed for lack of personal jurisdiction, there is no need to consider the merits of **Bennett's** alternative motion to transfer to the District of Idaho and it is denied as moot.

III. Motion to File Amended Complaint

Siskiyou's motion to file amended complaint is governed by Fed. R. Civ. P. 15(a), which states:

> [A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Leave to amend should be permitted in the absence of undue delay, bad faith, futility of amendment, or prejudice to the opposing party. *Edwards v. Occidental Chemical Corp.*, 892 F.2d 1442, 1446 (9th Cir. 1990).

Through its motion to amend, Siskiyou seeks to add a tort claim for misrepresentation, apparently in an effort to

strengthen its personal jurisdiction argument. The proposed amended complaint does not include any alleged facts that are relevant to a personal jurisdiction analysis and, accordingly, does not affect my decision that this court lacks jurisdiction over **Bennett**. Given that **Siskiyou's** proposed amended complaint cannot provide this court with personal jurisdiction, it would be futile for **Siskiyou** to amend its complaint. Accordingly, Siskiyou's motion to file amended complaint is denied.

CONCLUSION

For the foregoing reasons, the motion to dismiss (# 4-1) by defendant Bennett Holdings, L.C. is granted. The alternative motion to transfer to the District of Idaho (# 4-2) by defendant **Bennett** Holdings, L.C. is denied as moot. The motion to file amended complaint (# 25) by plaintiff **Siskiyou** Properties, L.L.C. is denied.

IT IS SO ORDERED.

DATED this 15 day of November, 1999.

GARR M. KING

United States District Court Judge